Carole Ann Paolicelli, Paul Paolicelli, and Carole Ann and Paul Paolicelli and West Dixie Enterprises, Inc., Alter Egos, and a Single Employer *and* International Brotherhood of Electrical Workers, Local Union 728, AFL–CIO. Case 12–CA–16716

August 27, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On November 8, 1997, the National Labor Relations Board issued a Decision and Order in this proceeding in which it ordered the Respondents, West Dixie Enterprises, Inc., Carole Ann Paolicelli, and Paul Paolicelli (collectively called the Respondent), to make whole John Ranken, David Svetlick, and Roger Whetstone for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. *West Dixie Enterprises*, 325 NLRB 194 (1997). On July 20, 1999, the United States Court of Appeals for the Eleventh Circuit affirmed the Board's Order. *NLRB v. West Dixie Enterprises,* 190 F.3d 1191 (11th Cir. 1999). On January 31, 2001, the court of appeals, in Case 98–5192, issued as mandate its judgment enforcing the Board's Decision and Order.

A controversy having arisen over the amount of backpay due the claimants under the Board's Order, on October 31, 2000, the Acting Regional Director for Region 12 issued a compliance specification and notice of hearing (specification). The specification alleged amounts of backpay due and notified the Respondent of its obligation to file a timely answer complying with the Board's Rules and Regulations. On November 22, 2000, the Respondent filed an answer to the specification.

By letter dated December 8, 2000, counsel for the General Counsel informed the Respondent that the answer did not comply with Sections 102.56 and 102.114 of the Board's Rules and Regulations. The letter further notified the Respondent that the Regional Office would file a Motion for Summary Judgment or Partial Summary judgment, as appropriate, if a proper answer was not filed by December 22, 2000. The Respondent has not filed an amended answer.

On February 9, 2001, the General Counsel filed a Motion to Strike Respondent's Answer to Compliance Specification and for Summary Judgment; or in the alternative, Motion to Strike Portions of Respondent's Answer to the Compliance Specification and for Partial Summary Judgment. The General Counsel argues that the answer should be stricken and summary judgment granted because the Respondent failed to serve a copy on the Union as required by Section 102.56(a). Alternatively, the General Counsel moves to strike those portions of the Respondent's answer that either: (1) attempt to relitigate matters that were raised in the underlying unfair labor practice proceeding; or (2) fail to meet the specificity requirements of Section 102.56(b). As to the latter, the General Counsel further moves for Partial Summary Judgment on those allegations involving matters within the Respondent's knowledge which the Respondent has answered with general denials.

On February 14, 2001, the Board issued an order transferring proceedings to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. On February 26, 2001, the Respondent filed a Reply and Objection to Motion for Summary Judgment. The Acting General Counsel filed a Statement in Support of its Motion to Strike Respondent's Answer and for Summary Judgment and Response to Respondent's Reply and Objection to Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion to Strike Respondent's Answer to Compliance Specification and for Summary Judgment; or in the Alternative, Motion to Strike Portions of Respondent's Answer to the Compliance Specification and for Partial Summary Judgment.

1. Section 102.56(a) of the Board's Rules and Regulations provides:

> (a) *Filing and service of answer; form.*—Each respondent alleged in the specification to have compliance obligations shall, within 21 days from the service of the specification, file an original and four copies of an answer thereto with the Regional Director issuing the specification, and shall immediately serve a copy thereof on the other parties. The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the mailing address of the respondent.

Section 102.114(c) of the Board's Rules and Regulations provides:

> (c) Failure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either:
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> (1) A rejection of the document; or
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> (2) Withholding or reconsidering any ruling on the subject matter raised by the document until after

service has been made and the served party has had reasonable opportunity to respond.

The General Counsel alleges that the Respondent's November 22, 2000 answer should be stricken because the Respondent did not serve it on the Union.[1] In reply to the General Counsel's Motion for Summary Judgment, the Respondent asserts that: at the time it filed its answer, it did not have the Union's correct mailing address; it telephoned the Regional Office several times in an attempt to obtain the Union's correct mailing address, but was unsuccessful; and, to ensure that its answer was timely filed and a copy would be served on the Union, it mailed both the original and the Union's copy to the Regional Office, the latter "in care of" the Acting Regional Director. In its statement in support of its motion, the General Counsel acknowledges the Respondent's attempt to serve the Union "in care of" Board personnel, but maintains that such a service attempt is inadequate under Section 102.56(a). Additionally, the General Counsel asserts that NLRB Form B-4338 (6-90), which is routinely enclosed with all compliance specifications and which was served upon all parties in this case, contained all relevant addresses. Thus, the General Counsel argues that the Respondent had the Union's address at the time it filed its answer; moreover, the Respondent has not cured the deficiency by ever properly serving the Union.

For the following reasons, we deny the General Counsel's Motion to Strike the Answer and for Summary Judgment. Section 102.114(c), above, of the Board's Rules and Regulations permits, but does not require, the Board to reject a document not properly served on the parties. The "Board generally will not reject an improperly served document absent a showing of prejudice to a party." *Century Parking, Inc.*, 327 NLRB 21 fn. 7 (1998), citing *M.K. Morse Co.*, 302 NLRB 924 fn. 1 (1991); *U.S. Postal Service*, 239 NLRB 97, 98 fn. 2 (1978). Here, neither the General Counsel nor the Union has claimed, much less demonstrated, any prejudice. In fact, no claim has even been made that the Union has not received the document. While the Board strongly encourages strict compliance with its procedural rules, including those concerning the manner of filing and serving answers to complaints, the Board recognizes that the law favors a determination on the merits. *M.J. McNally, Inc.*, 302 NLRB 120 (1991); see *Quality Hotel*, 323 NLRB 864 (1997); *Dismantlement Consultants*, 312 NLRB 650, 651 (1993).[2] Accordingly, we decline to render a default judgment here.

2. Section 102.56(b) and (c) of the Board's Rules and Regulations provide:

> (b) *Contents of answer to specification*.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification*.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent

[1] In its response to the Respondent's reply, the General Counsel also argues that the answer appears to be deficient because it is not signed by the Respondent or "by a duly authorized agent with appropriate *power of attorney affixed*." The General Counsel's December 8, 2000 letter to the Respondent indicated that the answer received by facsimile was signed but the original contained an "/s/" designation. The General Counsel's Motion for Summary Judgment did not raise this alleged deficiency as a basis for striking the answer in its entirety, and we decline to do so on this basis now.

[2] Those cases in which the Board has granted summary judgment generally involve circumstances more egregious than those presented here. Compare *Baumgardner Co.*, 298 NLRB 26 (1990), enfd. mem. 972 F.2d 1332 (3d Cir. 1992) (summary judgment not granted where amended answer was copy of original and respondent failed to provide four copies) with *Contractors Excavating, Inc.,* 270 NLRB 1189 (1984) (summary judgment granted where, after five separate extensions of time in which to file answer, respondent ultimately filed only unsigned and undated document purporting to be answer).

shall be precluded from introducing any evidence controverting the allegation.

Paragraph 2 of the specification sets forth the backpay period for the discriminatees. In its answer to the specification, the Respondent generally denies paragraph 2. Consistent with this denial, the Respondent raises a second affirmative defense that the discriminatees were never hired as full-time or "long-term" employees, a third affirmative defense that the starting employment date is incorrect, and a fourth affirmative defense that the ending employment date is incorrect.

The General Counsel argues that, to the extent that the Respondent is attempting to argue at the compliance stage that the discriminatees were not bona fide applicants or that their starting dates are incorrect, the Respondent is attempting to relitigate issues decided in the underlying unfair labor practice case.

We agree. In that case, the judge found that the Respondent refused to hire the discriminatees on August 5, 1994, because they were union members. The Respondent did not except to these findings, and we adopted them pro forma. Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1617 (2001); *Arctic Framing***,** 313 NLRB 798, 799 (1994). The Respondent is thus barred from raising its second and third affirmative defenses at the compliance stage of this case.[3] *Ellis Electric*, 321 NLRB 1205 (1996); *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990). Accordingly, those portions of Respondent's answer which deny matters previously litigated constitute an inappropriate pleading and should be stricken. *Baker Electric*, 330 NLRB 521 (2000); *Unico Replacement Parts,* 286 NLRB 738, 739 (1987).

As to the Respondent's fourth affirmative defense, the General Counsel argues that Respondent has failed to comply with the Board's specificity requirements. The Respondent alleges that the ending date of the backpay period is incorrect because the corporation was not in existence then.

Again, we agree with the General Counsel. This subject is within the Respondent's knowledge. As to such subjects, the Board's Rules require more than a general denial and/or affirmative defense lacking in specificity. The Respondent must specifically state the basis for its disagreement, setting forth in detail its position as to the applicable premises and furnishing the appropriate supporting figures. *Shenandoah Coal Co.,* 312 NLRB 30 (1993), citing *Best Roofing Co.*, 304 NLRB 727, 728 (1991). Since the Respondent has failed to support its denial with any specific alternative date of employment on which the backpay period should end (and, concomitantly, any basis for that date), the Respondent has failed to comply with the requirements of Section 102.56(b). *Aspen*, 310 NLRB 775, 776 (1993).

Accordingly, as to paragraph 2, we find that Respondent has failed to deny the backpay period in the manner prescribed in Section 102.56(b) and (c). Moreover, Respondent has not adequately explained its failure to do so. Thus, Section 102.56(c) requires that paragraph 2 of the specification be deemed admitted. *Baker Electric*, above.

Respondent also generally denies paragraphs 7, 22, and 23, and states that it is without sufficient knowledge to admit or deny each of the other allegations of the specification.[4] Paragraphs 1, 3, 4, 5, 6, 7, 8, 11, and 14 all relate to the computation of gross backpay.[5] Consistent with its denial of paragraph 7, the Respondent asserts a first affirmative defense contending that the discriminatees are only entitled to an hourly wage of $10, "based upon their testimony herein."

Regarding these denials, the General Counsel contends that the Respondent's answer does not comply with the Board's specificity requirements. The General Counsel argues that the wage rates paid to comparator employees and other factors related to gross backpay are within the Respondent's knowledge and control.[6] The General

[3] In its reply, the Respondent states that it is not attempting to relitigate the refusal to hire issue, but merely questioning the "dates and figures" used to calculate backpay. One of the judge's findings was the date on which the Respondent refused to hire the applicants. This date cannot be relitigated here.

[4] Pursuant to Sec. 102.56(b), when a Respondent states that it is without knowledge of an allegation, such statement shall operate as a denial.

[5] Par. 1 defines gross backpay. Par. 3 admits that there is no gross backpay liability during certain calendar quarters. Par. 4 sets forth the backpay formula. Pars. 5 and 6 allege the average hours worked and projected and the hourly wage rates earned by comparator employees. Par. 7 alleges the discriminatees would have earned $12/hour during the backpay period. Pars. 8, 11, and 14 allege the gross backpay of the three discriminatees. Pars. 9, 12, and 15 admit the three discriminatees' interim earnings. Pars. 10 and 13 admit that two of the discriminatees incurred no interim expenses. Par. 16 alleges the third discriminatee's interim expenses. Pars. 17 and 18 define calendar quarter net interim earnings and net backpay, respectively. Pars. 19 through 21 allege the total net backpay due the three discriminatees, respectively. Par. 22 seeks to foreclose the Respondent from introducing previously demanded wage and hour information. Finally, par. 23 summarizes the total backpay due.

[6] In reply, the Respondent states that it has never been involved in a backpay proceeding before, and that it thus possesses no unique knowledge in this area. The premise of the Respondent's knowledge and control does not relate to the Respondent's relative experience in backpay proceedings; rather, it relates to which party is in possession of the information and records necessary to compute backpay. Despite Re-

Counsel further argues that the Respondent provided no basis for its selection of the $10/hour figure.

We agree that the Respondent has not met the specificity requirements of Section 102.56(b), above. Respondent has provided no basis for disagreeing either with the definition of "gross backpay" set forth in paragraph 1, or with the alleged average hours worked and projected, and hourly wage rates earned by comparator employees. Nor has the Respondent provided an alternative backpay formula. While the Respondent has set forth a specific alternative wage rate for the discriminatees ($10/hour), it provides no record citations to the testimony allegedly supporting its claim, nor does it explain why it is inappropriate to use the average wage rate ($12/hour) of the comparator employees.[7]

As stated above, our Rules require more than a general denial or affirmative defense lacking in specificity. The Respondent's failure to detail its position as to the applicable premises or to furnish appropriate supporting figures or alternative calculations to those alleged in the specification is contrary to the specificity requirements of the Board's Rules. *Baker Electric*, above. Accordingly, we deem the Respondent to have admitted the allegations of paragraphs 1, 3(a) and (b), 4(a) and (b), 5, 6, 7, 8, 11, and 14 of the specification.

The Respondent's denial of the General Counsel's admission that two of the discriminatees incurred no interim expenses during the backpay period (specification, pars. 10 and 13) raises no issue of law or fact. Accordingly, we deem paragraphs 10 and 13 admitted.

The Respondent denies paragraphs 17 and 18, which define calendar quarter net interim earnings and calendar quarter net backpay, respectively. The General Counsel argues that the Respondent provided no alternative definitions, but appears to attack the *Woolworth* formula. *F. W. Woolworth Co.*, 90 NLRB 289 (1950).[8] In reply, the Respondent states that it is not arguing the appropriateness of the *Woolworth* formula, but merely referring to the discriminatees' testimony that they were employed by the Union. Since the Respondent now effectively concedes it is not arguing the definitional aspects of paragraphs 17 and 18 (and, as seen below, the discriminatees' interim earnings remain in issue), we deem these paragraphs admitted.

In sum, we grant the General's Counsel alternative Motion to Strike Portions of Respondent's Answer to the Compliance Specification and for Partial Summary Judgment. Pursuant to Section 102.56(b) and (c), the paragraphs of the specification to which an answer has been stricken are deemed to be admitted to be true. Since these allegations have been deemed admitted, we enter an Order for Partial Summary Judgment on the following paragraphs: 1, 2, 3(a) and (b), 4(a) and (b), 5, 6, 7, 8, 10, 11, 13, 14, 17, 18, and 22. Paragraphs 9, 12, 15, and 16, relating to interim earnings and interim expenses;[9] paragraphs 19, 20, and 21, relating to total net backpay (as may be affected by the preceding paragraphs); and paragraph 23, the summary paragraph, remain in issue pursuant to the Respondent's denials. These issues are the only issues subject to further litigation.

ORDER

IT IS ORDERED that the General Counsel's Motion to Strike Portions of Respondent's Answer to the Compliance Specification and for Partial Summary Judgment is granted as specified above.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 12 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence on paragraphs of the compliance specification as to which summary judgment has not been granted.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all of the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

spondent's asserted "novice" status, it is still the party in control of the wage and hour information.

[7] The Respondent states that the transcript in the underlying case sets forth "the date the individuals were hired, the per hour wage that they agreed to work for, and the length of time that they were employed. . . ." Since the discriminatees were never hired by the Respondent, the inadequacy of the Respondent's assertion that $10/hour is the appropriate wage rate is obvious. Moreover, as the specification shows, everyone hired between August 5, 1994, and December 20, 1994, earned more than $10/hour.

[8] In *F. W. Woolworth*, above, "net interim earnings" are defined as "earnings less expenses. . . ." Expenses are deducted from interim earnings on a calendar quarter basis, and no expenses are allowed over the amount of earnings, if any, during the respective calendar quarter. *Mastro Plastics Corp.*, 136 NLRB 1342, 1348 (1962).

[9] Regarding the issue of interim earnings, a general denial is sufficient under the Board's Rules to warrant a hearing because that information is generally not within the respondent's knowledge. *Aroostook County Regional Ophthalmology Center*, supra at 1619 (2001), citing *Dews Construction Corp.*, 246 NLRB 945, 947 (1979).